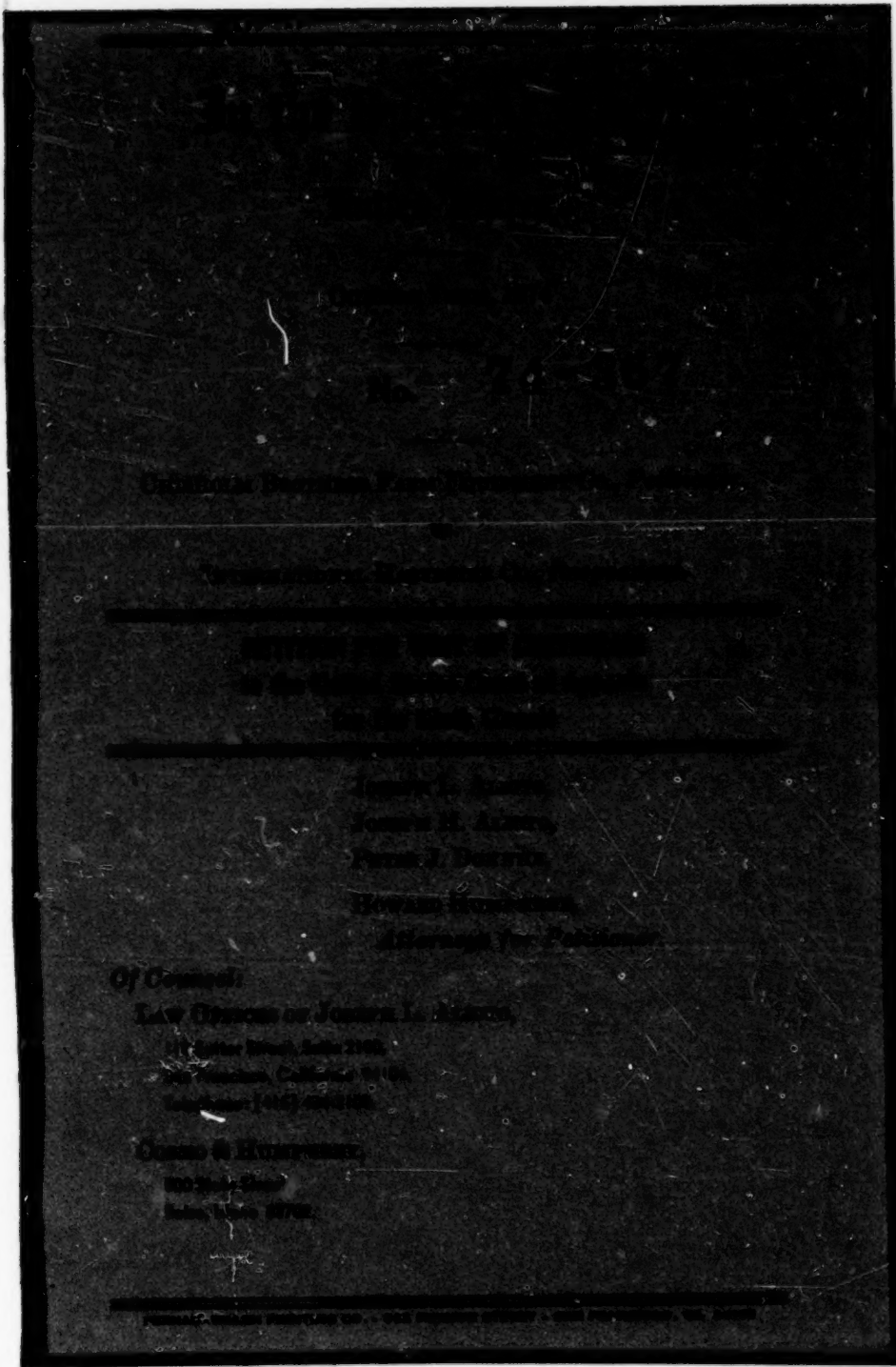

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No.

CHISHOLM BROTHERS FARM EQUIPMENT CO., *Petitioner,*

vs.

INTERNATIONAL HARVESTER CO., *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner, Chisholm Brothers Farm Equipment Company (hereinafter "Chisholm") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Court of Appeals No. 71-3012) entered in the above entitled case on May 17, 1974. Chisholm's petition for rehearing and suggestion for rehearing in banc was denied by the Court of Appeals on July 9, 1974.

OPINIONS OF THE COURTS BELOW

The jury trial in this case took place in the United States District Court for the District of Idaho and commenced on or about August 18, 1971. At the close of plaintiff Chisholm's case on liability, the District Court directed a verdict in favor of defendant International Harvester Company (hereinafter "International"). (T. 1522-1524).[1] The District Court's judgment was entered without an opinion and is unreported.

On May 17, 1974, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. The Court of Appeals opinion is reported as follows: "*Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137 (9th Cir. 1974)." A copy of that opinion is set forth as **Appendix A** to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 17, 1974. Petitioner Chisholm timely filed its petition for rehearing and suggestion for rehearing in banc which was denied by the Court of Appeals on July 9, 1974. (A copy of the Court of Appeals order denying Chisholm's petition for rehearing is set forth as Appendix B to this Petition.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

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[1] "T. ....." refers to page numbers in the Reporter's Transcript at trial. "R. ....." refers to page numbers in the Record on Appeal.

QUESTIONS PRESENTED

This case, together with numerous others presently (or soon to be brought) before this Court[2] present extremely important issues relating to the enforcement of the federal antitrust laws. It is another in the growing line of antitrust cases in which District Courts and Courts of Appeal have usurped the function of the jury. As such, the questions raised in this Petition concern the role of the jury in antitrust cases, the standard of proof and nature and sufficiency of evidence in antitrust conspiracy cases. The rulings below seem to undermine numerous decisions of this Court and conflict with rulings in other Circuits which require deference to the jury and which warn against the use of summary procedures in antitrust litigation. Specifically, the issues presented by this Petition are:

(1) Whether the ruling below, a judgment on a directed verdict against plaintiff Chisholm as to its antitrust claims under Sections 1 and 2 of the Sherman Act, is inconsistent with this Court's numerous pronouncements concerning the role of the jury in implementing the important national policies of the federal antitrust laws?

(2) Was the evidence presented by plaintiff sufficient to raise issues for the jury as to whether defendant International engaged in vertical price control or instigated and effectuated a plan for fixing or otherwise interfering with prices charged by its dealers, horizontally, at the retail level, in violation of Section 1 of the Sherman Act?

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[2]See, for example, *England v. Chrysler Motor Corp.*, 493 F.2d 269 (9th Cir. 1974) (U.S. Sup. Ct. Docket No. 74-24).

(3) Whether there was sufficient evidence from which the jury could have found that defendant monopolized, conspired to monopolize, or attempted to monopolize farm equipment and trucks in Cassia and Minidoka Counties in Idaho in violation of Section 2 of the Sherman Act?

(4) Whether the Court below erred in refusing to direct a verdict in favor of plaintiff Chisholm and against defendant International on the ground that defendant's co-dealership program operated as an unlawful contract and combination in violation of Section 1 of the Sherman Act?

STATUTES INVOLVED

(1) Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with nations, is declared to be illegal. . ."

(2) Section 2 of the Sherman Act (15 U.S.C. §2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

(a) Nature of the Case

This is a private antitrust action for damages under Section 4 of the Clayton Act (15 U.S.C. §15). Plaintiff-petitioner Chisholm alleges that defendant-respondent International violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2). [R. 3].

During the period covered by the complaint, Chisholm was in the business of selling at retail and servicing trucks and farm equipment manufactured by defendant International. Chisholm had been engaged in that business for a period of approximately thirty (30) years in Burley, Idaho. [T. 679-684]. Chisholm, like other dealers of International Harvester products, operated under a franchise agreement with the defendant. [R. 3].

The defendant International is a corporation located in Chicago, Illinois, and is recognized as one of the leading manufacturers of trucks and farm equipment in the nation. [R. 4-5].

Chisholm alleges that defendant International and various co-conspirators illegally combined to eliminate plaintiff as an International dealer in violation of Sections 1 and 2 of the Sherman Act. The named co-conspirators were competing retail dealers of International products (Cameron Sales, Inc. of Rupert, Idaho, and Smith Brothers of Oakley, Idaho) and GEM International, the retailer which succeeded plaintiff Chisholm as the International Harvester dealer in Burley. [R. 4-8]. Co-conspirators Cameron Sales, Inc. and GEM were "co-dealerships" with seventy-five percent of the business owned by defendant International. [D. Exh. 308; T. 499].

Plaintiff Chisholm alleges that International attempted to fix the retail prices at which plaintiff sold International Harvester products. When plaintiff refused to comply, defendant International combined and conspired with other dealers and co-dealers who were in competition with plaintiff Chisholm to restrain trade by fixing predatorily low prices. After eliminating Chisholm, defendant International replaced plaintiff with a co-dealership which International controlled and which was operated by the former International employees who attempted to compel Chisholm to fix retail prices. [R. 6-8; T. 51-53, 85-87]. With Chisholm eliminated, International organized a price-fixing meeting at which the controlled dealers agreed on a certain price to sell their product. Chisholm alleges that this comprehensive anticompetitive program was undertaken by defendant International in order to control retail dealerships and to fix and maintain uniform resale prices in clear violation of Sections 1 and 2 of the Sherman Act. [R. 608].

(b) The Course of Proceedings and Disposition in the Court Below

The amended complaint was filed by plaintiff Chisholm on July 7, 1969. [R. 3]. Defendant filed its answer on August 11, 1969. [R. 11]. On February 8, 1971 the defendant filed a motion for summary judgment. [R. 58]. On March 24, 1971 the Court denied the motion stating that:

> ". . . full briefing has been afforded the parties. No formal hearing appears required. The Court is of the opinion that there remain genuine issues of material facts and that summary judgment will not lie." [R. 449].

On April 5, 1971 the defendant filed a Motion for Reconsideration of the order denying summary judgment. [R. 450]. On April 20, 1971 the District Court again denied the defendant's motion stating that:

> "The issues raised by the motion for summary judgment were fully briefed as to the law and were extensively enlarged on by detailed references to deposition and documentary evidence. The Court examined these showings with care. Formal oral arguments would serve no purpose. . . In this case genuine issues as to material facts appear to the Court to remain for determination." [R. 469].

A jury trial commenced on or about August 18, 1971. At the conclusion of plaintiff's case on liability on August 27, 1971, the defendant again moved for directed verdict, and this time the District Court granted defendant's motion and directed a verdict as to the issue of liability. [R. 1522-1524]. In so doing, the Court conceded, for our present purposes, that plaintiff had provided adequate proof to establish injury and proximate causation. [T. 1522]. The Court went on to grant defendant's motion for directed verdict solely on its belief that plaintiff Chisholm failed to present sufficient evidence as to facts demonstrating that International violated the antitrust laws. [T. 1522-1523].

On August 31, 1971 judgment was entered in favor of defendant International. [R. 513]. Subsequently, on May 17, 1974, the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the District Court.

(c) Statement of Facts

Plaintiff Chisholm along with Cameron Sales, Inc. and Smith Bros. were all retail sellers of International Har-

vester trucks and farm equipment which were the products involved in the relevant market of Cassia and Minidoka counties in Idaho. [Pl. Exh. 194 T. 1393, *et seq.;* Pl. Exh. 233, T. 869]. As to farm equipment, it was shown that a large percentage (sometimes as high as 75%) of sales in the two counties was made by defendant International. [Pl. Exh. 194; T. 1392-1398]. There were nine competing manufacturers of farm equipment, none of whom had more than one dealer in the area, whereas International had three. [Pl. Exh. 194; T. 1392-1398]. Chisholm had operated as an International Harvester dealer for approximately thirty (30) years in Burley (Cassia County), during which time a highly successful business operation was developed with superior equipment, service, location, plant, management and personnel. [T. 679, 682-684, 705-709].

Chisholm moved into the Burley area in 1940. Plaintiff was serving the entire two-county area with the possible exception of Oakley, and even this area was promised to Chisholm after the relatively inactive dealer in Oakley retired. [T. 680-682]. However, in 1952—after Chisholm refused to act as retail dealer for International's new refrigerator line[3]—the Oakley franchise was awarded to Smith Brothers. [T. 701-702].

In 1944, Chisholm opened a new dealership in Rupert, Idaho, (in Minidoka County, eight miles from Burley) and assigned Cameron (a Chisholm employee) to manage the new operation. [T. 685-687]. Subsequently, defendant International advised Chisholm that the Rupert dealer-

[3]International's new venture into the manufacture and sale of refrigerators was later abandoned. [T. 853-858].

ship should be sold to Cameron or else International would "lock the door" on Chisholm's Burley operation. [T. 687-688]. Chisholm complied, and the Rupert franchise was sold to Cameron. [T. 688]. Nevertheless, Chisholm's operation remained the largest, most efficient, and best equipped dealership in the area with the best service facilities. [T. 70, 706-709].

In 1961, Mr. Calvin Johnson was assigned by International as the dealer representative for the area which included Burley, Rupert and Oakley, Idaho. [T. 47-48]. Almost immediately thereafter, attempts were made by International to compel Chisholm to lower prices on International Harvester products. In 1962, Johnson began filing complaints with International's management concerning Chisholm's prices and, particularly, plaintiff's desire to establish its own prices and its unwillingness to "sacrifice his profits" in order to "move" International Harvester products. [Pl. Exh. 22; T. 51-53]. Johnson advised "cancelling the contract" and Johnson's superior, Lynn Smith, Salt Lake Region director, asked other managers to meet and seriously discuss cancelling Chisholm. [Pl. Exh. 77; T. 85-87; Pl. Exh. 142; T. 125]. These complaints by Johnson regarding Chisholm's pricing practices continued up to the date of Chisholm's termination as a dealer. [T. 56; 85; Pl. Exh. 77].

It was clear that the profit which defendant International realized at the manufacturer level depended on the sales volume at the retail level. The defendant's profit per sale remained stable irrespective of the dealer's retail price. [T. 55-56, 70]. Moreover, the defendant's employees who served as dealer representatives derived commissions

on the basis of sales to dealers. [T. 48]. Thus, the defendant and its employees such as Calvin Johnson had obvious financial motives for coercing dealers to lower retail prices.

There is evidence of many occasions on which International representatives would visit Chisholm in an effort to make Chisholm conform to International's lower price demands. [T. 1187-1191].

On May 4, 1967 Mr. Johnson (who was the co-dealer who succeeded Chisholm) stated to Mr. Smith regarding Chisholm:

> "With the attitude they have and it now is apparent to have rubbed off on their employees, they can't possibly exist in today's competitive market. It is the writer's opinion in the interest of the company as well as these two men, *we should take steps to cancel their farm equipment contract by the end of 1967 fiscal year.*" [Pl. Exh. 142; T. 125] (Emphasis added.)

Mr. Smith notes on the memo distributed to the other International representatives [T. 125-126]:

> "Let's discuss this seriously."

This memo is a repeat of Mr. Johnson's memo to Mr. Smith dated June 23, 1966 in which Mr. Johnson:

> ". . . asked for management's help in getting this contract changed." [Pl. Exh. 77; T. 90, 101-107]

The report prompted another visit to Chisholm's facility and further conferences between International representatives and Chisholm management. The purpose of these visits and conferences was, as usual, to attempt to pres-

sure plaintiff to reduce its prices in order to increase volume. [T. 57-58, 148-165; Pl. Exh. 22, 77].

As it became obvious that plaintiff Chisholm would not comply with International's price reduction demands, defendant converted the Cameron dealership in Rupert, Idaho (just a few miles away from Chisholm's facility) into a co-dealership. [T. 79-80]. Under this co-dealership arrangement, International owned seventy-five percent (75%) of the business and possessed all voting power in the operation (Cameron retained a 25% non-voting interest); moreover, the board of directors of the co-dealership, which had the power to control prices as well as other business decisions, was made up of five or six International representatives and Cameron. [D. Exh. 308; T. 499, 1438-9, 334-345].

There is overwhelming evidence [Pl. Exh. 44, T. 334-336, 341; Pl. Exh. 50, T. 343-345; Pl. Exh. 34, T. 348; 360; Pl. Exh. 63, T. 374-375, 390, 397; Pl. Exh. 65, T. 1031-32; Pl. Exh. 88, T. 408-410; Pl. Exh. 105, T. 1075; Pl. Exh. 119, T. 427, 434; Pl. Exh. 161, 165, T. 444-447, 460; T. 1028-1032; 1066-1096, 1119] that International utilized its domination of the Cameron board of directors to set extremely low prices in the relevant market. When Cameron attempted to show some independence, International immediately demonstrated its power and control as well as its intent to exercise such control, as is illustrated by a "Memo to File" on May 5, 1964 written by International's Mr. Steinman in Chicago regarding Cameron:

> "He admitted that he was aware of the directive given him by his Board of Directors *but also admitted he was testing to see if we were serious about the restriction. We informed him that we were suffi-*

ciently serious that if he disregarded our instruction, we would immediately remove all new inventory until such time as his barter objective had been reached." [Pl. Exh. 44; T. 334-336 (emphasis added)].

The Cameron board of directors under the leadership of International employees often made direct pricing decisions. [T. 390; D. Exh. 119; T. 427; 444-447]. A clear example of International's direct price fixing of Cameron's retail sales is contained in a memorandum to Mr. R. H. Burnside, Group Vice President, International Harvester in Chicago, who had the principal responsibility for the Co-Dealership Program. In that memorandum dated February 9, 1967 in reference to Cameron Sales, Inc., it is stated that [Pl. Exh. 177; T. 418-422]:

"We recommend that the following plan of action be put into effect by the Board of Directors on February 15, 1967:

1. Analyze each piece of overage new equipment and *establish a price* that will enable the corporation *to sell it at retail* in sixty days or assist the District in transferring it to dealers or returning it to company inventory."

The meeting of the Board of Directors of Cameron was held on February 15, 1967. The directors in attendance were: Clark Cameron; and for International Harvester, Messrs. Jennings, Crawford, Walker, Smith, Bukvich, and Poepping. Among the decisions made by the Board of Directors was that some International Harvester products

"should be given special sales attention at special prices"

and that other equipment be given to other dealers with

> "the corporation [Cameron to] absorb the transfer penalty of 3-¼%." [Pl. Exh. 120; T. 434].

The minutes of the Annual Stockholders Meeting for that year for Cameron Sales, Inc. reflect the presence of Mr. Burnside from Chicago and again evidence that the Board of Directors engaged in fixing the retail prices charged by the dealership. [Pl. Exh. 120; T. 434-35]. In a memorandum from Mr. Steinman to Mr. Burnside dated March 25, 1965, he reported the annual meeting of Cameron Sales at which Mr. Burnside and the other International Harvester Directors were present. At that meeting it was reported that

> "Mr. Smith expounded at some length on the necessity and advisability of taking every sale that they were able to obtain *of any dollar gross margin that was obtainable.*" [Pl. Exh. 199; T. 355-56]. (Emphasis added).

Because Mr. Cameron's son, John, had made some remarks to Mr. Burnside at the meeting with respect to their freedom of operation, it was clear that Mr. Cameron himself felt obliged to reassure International Harvester that such comments would not be made in the future. On page 4 of the March 25 document it states:

> "He (Cameron) assured us that he would correct the attitude displayed by his son, John, in his comments to Mr. Burnside, . . ." [T. 363].

Defendant International continued to fix prices with Cameron as is noted in the July 9, 1968 memorandum from Mr. Crawford to Mr. Bukvich where Mr. Crawford com-

ments as to the co-dealership's "all-out effort" to sell new and used equipment by lowering prices so drastically that the dealership would realize no profit. [Pl. Exh. 196, T. 439-460].

There was also evidence that the defendant's pressure on the Cameron co-dealership to lower its prices was undertaken, in part, as a means of undercutting the prices charged by plaintiff, or coercing plaintiff to similarly reduce retail prices for International Harvester products. [Pl. Exh. 146, T. 134; Pl. Exh. 200, T. 1120-1122]. The effect of this arrangement upon the retail operation of Cameron as well as the plaintiff was inevitable. In the pre-co-dealership years of 1961-1963 Cameron showed net profits of $24,445, $7,479, and $17,151. After 1964 under the co-dealership arrangement, however, Cameron showed significant losses even though it increased its sales volume. [T. 175-176, 301-306, 456].

Similarly, the Smith Brothers dealership in Oakley was utilized by defendant International as a means and for the purpose of coercing plaintiff Chisholm to reduce prices or face destruction of its business. [T. 134, 141-144]. International permitted Smith Brothers to operate at a much lower overhead (as compared to plaintiff) and refused to enforce the terms of the franchise agreement with Smith Brothers which required that the dealer have adequate service facilities and parts inventory. [T. 101-115]. International "oversold" Smith Brothers thereby forcing that dealership to sell at or below cost to avoid even greater losses in the payment of interest to defendant. [T. 568, et seq.]. The result of this was that Smith Brothers, although one of the leading dealerships in

terms of business volume, showed no net profit from its operation. [T. 582-588]. Indeed, as the Court itself observed during Smith's examination:

> "The Court: . . . The only reason that he wasn't going to the poorhouse is that the farm operation was making some money." (T. 587).

Moreover, there was clear evidence that defendant International gave preferential treatment to the dealerships in Rupert and Oakley and discriminated against plaintiff Chisholm with respect to important financial arrangements. [Pl. Exhs. 100, 101; T. 109-116].

Finally, in September of 1968, International's Johnson and Mr. Ross Taylor, also an International representative, succeeded in their efforts to take over the Chisholm Brothers' operation and establish an International co-dealership in Burley. [T. 46]. Mr. Taylor visited Mr. Burnside in International's Chicago office to receive Mr. Burnside's approval. [T. 181-183]. After having received approval and with the pressure on Chisholm regarding the interest it owed to International as well as the amount of money lost by them in their operation attempting to compete against the predatory low prices of the co-conspirators, GEM, International (a co-dealership) replaced plaintiff. [T. 46]. In August of 1968, Mr. Crawford wrote the Co-Dealership Department in Chicago and Mr. Smith and Mr. Jennings stating that he, together with Mr. Jennings, met with Mr. Cameron for the purpose of advising him that International Harvester was installing a co-dealership at Burley to replace Chisholm Brothers. [Pl. Exh. 200; T. 1120-1122]. Mr. Cameron advised that he had heard the rumor some time ago.

> "Mr. Cameron further stated that he thought that this could be helpful for the area and helpful to him. He hopes that the new dealer would go after the Massey-Ferguson and John Deere competition and *assist* him in this effort and not just fight between each other." [Pl. Exh. 200; T. 1120-1122] (emphasis added).

Ultimately, by forcing Chisholm out of business, defendant International was able to achieve its long sought objective of total control over retail pricing in the relevant market area. The best example of this is the open and flagrant price-fixing meeting called by International representatives for the purpose of setting a retail price on a particular International Harvester product. This meeting was called by defendant International's employees. Representatives from the three "competing" dealerships in the relevant market area (Cameron, Smith Brothers and GEM, International) were not only in attendance, but agreed to comply with the pricing decision reached at that meeting. [T. 205-213].

The brief statement of the evidence above—as more fully supplemented in the relevant portions of this petition—clearly demonstrates that defendant International attempted to and did in fact use its power to fix retail prices. It also shows that the plaintiff Chisholm was subsequently forced out of business because Chisholm tried to make a profit in its business by selling International products at a price which plaintiff independently determined. Because Chisholm thought it better not to order new equipment until it had sold equipment on hand and because Chisholm thought it better to sell equipment at a reasonable profit, International was not able to sell as

much to Chisholm. In short, International wanted to maximize its profits through large volume sales to the dealers, even if it meant that the dealers should sacrifice their profits in order to move the products.

The evidence, when viewed as a whole drawing all reasonable inferences favoring plaintiff's case, clearly establishes a question for the jury as to whether defendant International combined with its retail dealers to set retail prices and/or whether plaintiff was forced out of business because of its failure to comply with or acquiesce in defendant's re-sale price-fixing scheme. The directed verdict and judgments of the Courts below interfered with the function and role of the jury to resolve this important factual issue.

REASONS FOR GRANTING THE WRIT

This case is but one of many recent rulings—particularly within the Ninth Circuit—in which the role of the jury in antitrust cases has been completely disregarded. See, for example, *Hallmark Industry v. Reynolds Metal Co., et al.*, 489 F.2d 8 (9th Cir. 1973), *cert. denied*, (U.S. S.Ct. docket No. 73-1524); *England v. Chrysler Motor Corp.*, 493 F.2d 269 (9th Cir. 1974) (U.S. S.Ct. docket No. 74-24); *Coin Automated Products v. Maytag Co.*, Northern District of California, Civil Case No. C-70-2519-SW (July, 1973); *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, Central District of California, Civil Case No. 71-3085-DWW (1973).

The problem presented has grown to be one of monumental importance in federal antitrust practice, *i.e.*, interference by District Courts and Courts of Appeal with the

functioning of the jury. Only this Court can correct the situation be reaffirming and re-emphasizing the importance of deference to the jury in antitrust fact finding.

I. THE RULINGS BELOW UNDERMINE DECISIONS BY THIS COURT REGARDING THE ROLE OF THE JURY AND THE AMOUNT OF EVIDENCE NECESSARY IN PROVING THE EXISTENCE OF A CONSPIRACY IN AN ANTITRUST CASE

In appraising the evidence presented by plaintiff Chisholm, the courts below should have been mindful of the numerous judicial pronouncements warning against the use of summary procedures in civil antitrust cases. The District Court failed to follow their mandate. Instead, the Court invaded the province of the jury and granted the defendant's motion for a directed verdict. Such use of summary procedures to invade the province of the jury in antitrust cases has been consistently condemned by this Court. The determination of the existence *vel non* of a conspiracy requires a careful analysis *by the jury* of the defendant's motives and intent as illuminated by the direct evidence of its conduct and all reasonable inferences which may be drawn therefrom. In this case, the existence and purpose of defendant's conspiratorial conduct were ". . . material issues of fact which could only be resolved by the jury after a plenary trial." *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 703-704 (1969); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Cornwell Quality Tools Co. v. C.T.S. Co., Inc.*, 446 F.2d 825 (9th Cir. 1971); *Anderson v. American Auto Ass'n*, 1972 Trade Cases ¶73,793 (9th Cir. 1972).

As pointed out in the Statement of the Case, above, there was clear evidence that defendant International attempted to coerce plaintiff Chisholm into lowering its prices. Indeed, Chisholm was pressured to sacrifice profits in order to move International Harvester products. [Pl. Exh. 22; T. 51-53]. There is also evidence that defendant instituted a regular program of coercion regarding plaintiff's pricing practices under threat of cancellation of the plaintiff's franchise. [Pl. Exh. 77; T. 85-87].

The evidence further demonstrates that defendant International was more successful in controlling the pricing practices of nearby and surrounding retail dealers who were plaintiff's competitors. [T. 334-375; 568-588]. The Cameron dealership was converted into a "co-dealership" which allowed defendant, by virtue of its dominance of Cameron's board of directors, to directly control this supposedly independent retail dealership. [T. 1031-2; 1066-1096]. Similarly, the Smith Brothers dealership was induced to cooperate with respect to pricing. [T. 568-588].

There was also in the record evidence that once plaintiff Chisholm's dealership was replaced by an International dominated co-dealership (GEM, International), the defendant's control of retail pricing practices surfaced. Defendant's employees, in fact, called at least one meeting for the specific purpose of fixing a uniform retail price for an International Harvester product in the relevant market area. [T. 205-213]. This meeting, though it occurred after plaintiff was out of business, clearly evidences the intent and purpose of the defendant to combine with its dealers to control retail prices. *United Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965).

The direct evidence of International's attempts to coerce plaintiff to lower its prices and the evidence of International's relationships with the Cameron and Smith Brothers dealerships was sufficient to go to the jury. This evidence together with all reasonable inferences favoring plaintiff's case, would have clearly supported findings of vertical and horizontal price fixing.

In antitrust cases, the law of conspiracy is clear. It is not necessary to find an express agreement. An illegal combination is proven if, as in our present case, the defendant intended to fix prices and accomplished that aim through joint and concerted action with others. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. General Motors Corp.*, 384 U.S. 127, 142-143 (1966).

This Court, in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), a case of particular relevance here, made it clear that an illegal price-fixing combination exists when retailers acquiesce in the price-fixing scheme of their supplier. 390 U.S. at p. 149. See also: *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). There was in the record below an abundance of evidence from which the jury could properly have found such an illegal combination.

II. THE RULINGS BELOW UNDERMINE THIS COURT'S DECISIONS PROHIBITING PRICE-FIXING

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) this Court, in no uncertain terms, condemned all forms of price-fixing activity irrespective of the sub-

tlety or sophistication of the plan. In *Socony*, the Court ruled that the concerted "tampering with price structures" is unlawful *per se* under Section 1 of the Sherman Act. 310 U.S. at p. 223. Thus, any ". . . interference with the setting of price by free market forces is unlawful *per se*. . ." *United States v. Container Corp.*, 393 U.S. 333, 337 (1969).

This Court has also consistently recognized that vertical restraints exercised by a manufacturer over its independent dealers are unlawful *per se* if they are ancillary to price-fixing or if price-fixing is ". . . an integral part of the whole distribution system." *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 720 (1944); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963); *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 375 (1967). In *Schwinn*, the Court stated that in such situations:

> ". . . it is needless to inquire further into competitive effect because it is established doctrine that, unless permitted by statute, the fixing of prices at which others may sell is anticompetitive, and the unlawfulness of the price-fixing infects distribution restrictions." (388 U.S. at pp. 375-376).

In our present case, the evidence clearly established a *prima facie* case of vertical price control as well as resultant horizontal price-fixing at the retail level. The price-fixing was instigated and organized by defendant International in two ways.

First, International used economic coercion to compel its dealers in the relevant market to lower their prices and move International Harvester products even if it

meant sacrificing dealer profits. [Pl. Exh. 22; T. 51-53]. Unwilling dealers such as plaintiff Chisholm were constantly pressured to conform to International's established price-setting policy under the threat of the closing of the dealership and replacement by a new one which, presumably, would cooperate in International's price-fixing program. [Pl. Exh. 77; T. 85]. An important aspect of defendant's price-fixing scheme was to coerce retail dealers to sell International Harvester products at or near (and sometimes, substantially below) the dealer's net cost. [Pl. Exh. 54, T. 348; Pl. Exh. 199 T. 356-360; Pl. Exh. 363, T. 374-375; Pl. Exh. 165, T. 447, 460, 582-588, 1028, 1031-32, 1043; Pl. Exh. 105, T. 1075; Pl. Exh. 1255, T. 1086, 1094; Pl. Exh. 161, T. 1096, 1104; Pl. Exh. 197, T. 1117; Pl. Exh. 77, T. 85-89, 439-460].

Second, when a dealer such as Chisholm resisted this pricing pressure, the next step in defendant's scheme was to utilize its "co-dealership" program as a more effective means of controlling the retail pricing practices of competing dealers in the relevant market area.

The co-dealership program permitted the defendant, International to own 75% of the stock in the co-dealership. It provided that the individual appointed as co-dealer by International Harvester would be elected president and would also serve as a director, but that the board of directors would be comprised of representatives from the Co-dealership Development Department of International Harvester, and representatives from the district office under which the co-dealership operates. The representatives of defendant International were employees of the Company and served on the board of directors of

many if not all of the co-dealerships throughout the country. Moreover, with respect to this present case, the defendant's employees controlled the board of directors of Cameron Sales, Inc. and likewise, later GEM International—the successor to the Chisholm dealership after the plaintiff's elimination from the retail business. [T. 196-200]. Thus, competition in the relevant market was effectively controlled by the defendant through its dominant board of directors' representation and control of various "competing" retail dealerships. The co-dealership plan called for payment of a salary to the individual, and provided that all dividends and bonuses received by him would be used to "redeem" part of the 75% of the stock owned by the defendant. Under the plan Class A stock with power to vote was given only to defendant International; Class B stock which was non-voting was given to the individual co-dealer. Thus, regardless of the ownership interest of the co-dealer, he could have no voting power, or control over the business, unless and until he obtained 100% of the stock. In the event of liquidation, the Class A stock owned by International was the first to receive payment. The manner of distributing any amount of profit from the dealership which remained after the payment of bonuses, taxes, dividends, or loan payments was left to the discretion of the co-dealership board of directors. [Def. Exh. 308; T. 499].

Although the co-dealer was supposed to be "independent" and free to price his products in his best judgment [T. 1438-1439], in actuality he was controlled by the board of directors, all of whom (except for the dealer) were employees of the defendant. Thus, in effect, defendant

International was able to fix and control the retail prices charged by co-dealerships. [T. 1438-1441].

The defendant's "co-dealership" program must be appraised for what it is, a device by which International controls the pricing policies and other business decisions of its allegedly independent and "competing" retail dealers. To argue that these co-dealerships are independent of International or that the International representatives who dominate the co-dealers, boards of directors wear "different hats" in their dual capacities which insulate the co-dealership from International is patently absurd. *United States v. Sealy, Inc.*, 388 U.S. at p. 353.

For here, as in *Sealy*, the evidence clearly established a *prima facie* case that the joint venture was used by the defendant as a guise for horizontal price-fixing. The evidence reflects that the co-dealership arrangement was an effective means by which defendant International fixed and maintained the prices of its allegedly independent retail dealers. [T. 1438-1441]. Moreover, once these co-dealerships fixed prices, they were able to put additional pressure on competing dealerships such as plaintiff Chisholm to conform to the established lower price or suffer the consequences of being forced out of business. [T. 134; 141-144]. It is conceded for purposes of this present appeal that, as a result of this price-fixing program and its affect on the plaintiff Chisholm, plaintiff suffered substantial damage to his business and property. [T. 1522]. As a consequence, Chisholm ultimately sold his dealership to GEM, International (a co-dealership organized by Calvin Johnson, the former dealer-representative for International in the relevant market area) at a

price far below the market value of the business prior to the defendant International's effective implementation of its price-fixing scheme.

There was also direct evidence that once plaintiff Chisholm was out of the picture, the successor co-dealership GEM, International combined and conspired with other co-dealers and co-conspirators to horizontally fix the prices at which specific International Harvester products should be sold at the retail level. [T. 205-213]. This direct evidence of price-fixing concerned a meeting of "independent" and "competing" retail dealers which was called and organized by three employees of defendant International. [T. 210-211]. As Calvin Johnson testified concerning the competing dealers who met (including GEM, Cameron and Smith Brothers), ". . . we decided, as a group, that we would advertise it and sell it at the same price." [T. 211].[4]

From the above statement of a portion of the evidence —and the inferences to be drawn therefrom read in the light most favorable to plaintiff—it is obvious that the facts in the record establish a combination and conspiracy

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[4]Although this specific instance of a meeting of dealers instigated and organized by defendant for the purpose of fixing retail prices occurred after the injury to plaintiff Chisholm the evidence is of significant probative value in demonstrating that the defendant's co-dealership plan, as well as other forms of pressure exerted against independent dealers, had the purpose and effect of bringing about an anticompetitive situation in which prices could be and were easily fixed. See: *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *Standard Oil Co. v. United States*, 221 U.S. 146-147 (1911); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 at 709-710 (1962); *Armco Steel Corp. v. North Dakota*, 376 F.2d 206 (8th Cir. 1967); *Ohio Valley Electric Co. v. General Electric Co.*, 244 F.Supp. 914 (S.D.N.Y. 1965).

which is illegal *per se* under Section 1 of the Sherman Act. The evidence demonstrates that defendant International engaged in numerous acts directed at controlling the prices at which its supposedly independent dealers sold International Harvester products. In *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) this Court ruled that such vertical price control was illegal *per se.* The "price setting" combination between the manufacturer and the dealers is the crux of the illegality, even in cases where the dealers' acquiescence is secured by threats or other coercive practices on the part of the manufacturer.

In our present case, there was evidence from which the jury could well have found that defendant International attempted to and did vertically fix the retail prices of its dealers such as plaintiff by first threatening them with termination and then implementing its co-dealership plan in the relevant area.

Price-fixing accomplished by manufacturers through threats of terminating dealers is illegal *per se. Albrecht v. Herald Co., supra* 390 U.S. at 149; *United States v. Parke, Davis & Co., supra,* 362 U.S. at p. 45. And this is true, as in our present case, where the price-fixing is an effort to set maximum prices. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951). In *Kiefer-Stewart, supra,* the Supreme Court recognized that:

> "[agreements to fix maximum prices] no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." (340 U.S. at p. 213).

This view was emphatically reaffirmed in *Albrecht, supra,* where the Court, in language particularly relevant to our case, ruled:

> "It is our view, therefore, that *the combination formed by the respondent in this case to force petitioner to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under §1 of the Sherman Act.*" (390 U.S. at pp. 152-153.) (Emphasis added.)

In our case as in *Albrecht,* the defendant attempted to coerce its dealers to establish lower prices. Chisholm, like Albrecht, in the exercise of independent judgment, determined to set a price higher than defendant desired. As in *Albrecht* the defendant International began efforts to coerce the plaintiff-dealer to change his pricing practices; in effect, to pressure the plaintiff to sacrifice his profit in order to "move" the defendant's product. In this case, as in *Albrecht,* when plaintiff did not yield to defendant's pricing pressure, the defendant used its influence over plaintiff's competitors to force plaintiff to comply. The predictable result here and in *Albrecht* was the disintegration of the plaintiff's business.

It clearly follows from the *Albrecht* ruling that the vertical price-fixing by defendant International was illegal *per se* under Section 1 of the Sherman Act. The decisions below thus fly in the face of this Court's ruling in *Albrecht.*

III. DEFENDANT INTERNATIONAL'S CO-DEALERSHIP PLAN AS IT OPERATED WITH RESPECT TO PLAINTIFF HEREIN WAS A DEVICE USED TO FIX AND MAINTAIN PRICES, HENCE ILLEGAL PER SE UNDER SECTION 1 OF THE SHERMAN ACT.

From the extensive recitation of evidence previously set forth herein, it is clear that defendant International had numerous contacts with the supposedly independent Cameron co-dealership. These contacts clearly evidence a combination in which Cameron acquiesced in the price-setting demands of the defendant. Similarly, International's contacts with the GEM, International co-dealership are such as to constitute a combination between the defendant manufacturer and the separate and "independent" retail dealer.

It is also apparent that the two co-dealerships were utilized by defendant as a means of stabilizing and fixing the prices at which retail dealers sold International Harvester products. The evidence demonstrates that the defendant particularly utilized the Cameron agency, through the dominance of its board of directors as provided in the co-dealership plan, in an attempt to coerce independent dealers such as plaintiff Chisholm to conform to International's retail pricing demands. [Pl. Exhs. 50, 63, 88, 119, 161, 165; T. 343-345, 374-375, 390, 408-410, 427, 444-445, 447, 460].

The formal arrangement between defendant International and its co-dealers constitutes a combination for purposes of Section 1 of the Sherman Act. *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F.Supp. 453, 457 (W.D. Pa. 1968). Defendant International cannot and does not deny this arrangement whereby it retains 75% interest in

the dealership, possesses all voting stock and has its employees in control of the dealership's board of directors. Thus the existence of a contract or combination between International and the ostensibly "independent" co-dealerships is beyond question. See also *United States v. Sealy, Inc., supra,* 388 U.S. at p. 353.

It is clear that the so-called co-dealership arrangement is nothing more than a scheme to permit International Harvester to fix retail prices and otherwise control independent dealers. This is accomplished through a board of directors which sits on all of the co-dealerships in the area and, in most situations, throughout the country. Thus in the case at bar, the almost comical situation took place in which the co-dealership in Rupert and the co-dealership which took over the plaintiff in this case held their meetings one after another, with one of the so-called independent dealers sitting in an anteroom while the other so-called independent dealer was before the otherwise identical board of directors. [T. 1122, 1123]. Thus not only does the defendant International Harvester have the power to control the entire business of the supposedly independent dealer, but they do in fact exercise that control. [Pl. Exh. 88, T. 1066; Pl. Exh. 105, T. 1075; Pl. Exh. 125, T. 1086, 1094; Pl. Exh. 161, T. 1096; Pl. Exh. 165, T. 1104; Pl. Exh. 197, T. 1117; Pl. Exh. 201, T. 1119].

The District Court below erred in refusing to grant plaintiff's motion for a directed verdict [T. 1500] as to International's liability under Section 1 of the Sherman Act for operation of its co-dealership program. That error was compounded by the Court's subsequent grant

of a directed verdict in favor of the defendant, and the affirmance by the Court of Appeals.

Where a legal device such as a "consignment agreement" [compare *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964)] or—in our present case—a co-dealership plan is used as a device by a manufacturer to fix and control retail prices, it is illegal *per se* under Section 1 of the Sherman Act. See also: *United States v. Container Corp.*, 393 U.S. 333 (1969) where a business practice (i.e., exchange of prices between competitors) was used to accomplish a reduction in price competition this ". . . limitation or reduction of price competition. . ." brought the case within the ban of Section 1 because it constituted an ". . . interference with the setting of price by free market forces. . ." and thus was ". . . unlawful per se". 393 U.S. at p. 337. Similarly, under the circumstances established in our present case, defendant International utilized its co-dealership program to limit and reduce price competition at the retail level. As its plan operated in the relevant market area, it clearly interfered with the operation of free market forces in the setting of fair, reasonable, and competitive retail prices. The plan had a particularly deleterious impact on plaintiff Chisholm's ability to set its own independently determined prices. As such, the defendant's co-dealership plan necessarily involved it in combinations and conspiracies with cooperating or acquiescing retail dealers the purpose and effect of which was to permit defendant International to exercise a high degree of control over the pricing practices of the supposedly independent dealers. This renders the defendant's co-dealership program, as it operated under

the circumstances of this case, illegal *per se* under Section 1 of the Sherman Act.

IV. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT DEFENDANT INTERNATIONAL MONOPOLIZED, COMBINED TO MONOPOLIZE AND ATTEMPTED TO MONOPOLIZE THE RETAIL TRADE AND COMMERCE IN FARM EQUIPMENT AND TRUCKS IN THE RELEVANT MARKET.

In a case remarkably similar to the case at bar, *Mt. Lebanon Motors, Inc. v. Chrysler, supra,* the Court dealt with Chrysler's "co-dealership" program:

> "The gist of plaintiff's case is that Chrysler, beginning in 1962, established a number of dealerships which were either wholly owned and financed by Chrysler or substantially owned and controlled by Chrysler, the manufacturer holding 75% of the stock in the dealership corporation, and the so-called 'dealer enterprise' (co-dealership), dealer, who managed the dealership and was also paid a salary by the dealership corporation, 25% of the stock of the dealership corporation . . ."

The Court stated (283 F.Supp. at p. 458):

> "We are satisfied that there is no problem with respect to finding the existence of a contract, combination, or conspiracy.
>
> Chrysler Corporation manufactures motor vehicles and sells them at the source to its wholly owned subsidiary Chrysler Motors Corporation. Chrysler Motors Corporation enters into contracts, designated sales agreements, with each franchised dealership, which is a separate corporation. In the case of factory stores, whether wholly owned or under the (co-dealership)

plan, Chrysler Motors Corporation owns stock, and designates directors, and controls the activities of the dealership to the extent provided in the sales agreement Chrysler Motors Corporation also seeks out and engages individuals to act as manager of the factory stores and enters into contractual agreements with them, including in some cases special provisions for bonus in addition to the salary paid as manager of the factory store.

While there is no occasion in the case at bar to go so far as to attempt to find a 'bathtub conspiracy' between a corporation and its own employees, it seems clear that here there are a sufficient number of separate legal persons, both individual and corporate, to constitute a combination or conspiracy. Corporate affiliation or common ownership does not insulate against liability for violation of the antitrust laws. *United States v. Yellow Cab Co.*, 332 U.S. 218, 227, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593, 597-98 (1951)."

The Court went on to find substance in plaintiff's Section 2 claim that defendant Chrysler conspired to monopolize its retail trade. "Monopolizing" was recognized as possessing the power to control prices and/or exclude competition, a definition which clearly describes the nature and extent of the power that defendant International, both individually and in combination with its co-dealers, possessed and exercised over the retail market in our present case. 283 F.Supp. at pp. 460-461. See also: *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Griffith*, 334 U.S. 100 (1948).

The impact of defendant International's plan on the plaintiff is best emphasized by the similarity cited in *Mt. Lebanon, supra.*

> ". . . it would be profitable to Chrysler to sell cars even at a loss at the retail level, because the manufacturing profits would be greater than the retail losses. (citing the Cupples squeeze in *U.S. v. Aluminum Co. of America,* 233 F.Supp. 718, 727-29 (1964).)"

In directing a verdict for the defendant International, the District Court seemed to ignore the particularly strong evidence of defendant's attempt to monopolize. See *Lessig v. Tidewater Oil Co.,* 237 F.2d 459 (9th Cir. 1964) and *Industrial Building Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336 (9th Cir. 1970). Under *Lessig,* a Section 2 "attempt" case is established if plaintiff proves the defendant's *intent* to exclude plaintiff from "any part" of the market by "predatory" practices or "unfair means". *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951); *Union Leader Corp. v. Newspapers of New England, Inc.,* 180 F.Supp. 125 (Mass. 1960) affirmed in part, reversed in part, 284 F.2d 582 (1st Cir. 1960) *cert. denied,* 365 U.S 833 (1961).

In our present case, the evidence clearly established that defendant International was interested in maximizing its profits at the manufacturing level at the expense of its independent retail dealers. These dealers, such as plaintiff Chisholm were coerced by the defendant into lowering retail prices and sacrificing profits in order to move International Harvester products. International intended and attempted to, and often did, control retail prices charged by dealers in the relevant market area.

When plaintiff Chisholm resisted these illegal attempts by International to control prices, International used predatory means (including control of co-dealership and other dealer pricing practices) to pressure the plaintiff to conform. Ultimately, defendant was able to exclude plaintiff Chisholm from the market and to replace that independent dealer with an International dominated co-dealership—GEM, International. After GEM replaced plaintiff Chisholm, defendants' monopolization of the retail market and its power to set uniform retail prices was complete (as was exemplified by the formal and successful price-setting meeting called by International employees and attended by all the named co-conspirators). [T. 205-213].

This evidence of monopolization, conspiracy to monopolize and attempt to monopolize was more than sufficient to go to the jury and to justify a verdict in favor of plaintiff Chisholm in this case. See also: *Standard Oil Co. of New Jersey v. United States*, 211 U.S. 1, 31 S.Ct. 502 at pp. 511-516 (1910); *United States v. Consolidated Laundries*, 291 F.2d 563, 572-573 (2nd Cir. 1961); *Mount Lebanon Motors, Inc. v. Chrysler Corp., supra; Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F.Supp. 1080, 1093 (D. Md. 1969); *United States v. Grinnel Corp.*, 236 F. Supp. 244 (D.R.I. 1964); *United States v. Klearflax Linen Looms, Inc.*, 63 F.Supp. 32 (D. Minn. 1945).

The rulings below endanger the viability and future application of principles which this Court and lower courts in other circuits have developed and articulated under Section 2 of the Sherman Act. Certiorari should be granted to correct the faulty interpretation before it becomes even more widespread.

CONCLUSION

For the reasons stated above, this Court should grant Chisholm's petition for Writ of Certiorari.

Dated, October 1, 1974.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States Court of Appeal
for the Ninth Circuit

Chisholm Brothers Farm Equipment Co., Plaintiff-Appellant, vs. International Harvester Company, Defendant-Appellee.	No. 71-3012

[Filed May 17, 1974]

Appeal from the United States District Court
from the District of Idaho

OPINION

Before: ELY, TRASK and WALLACE, Circuit Judges

TRASK, Circuit Judge:

Chisholm Brothers Farm Equipment Co. (Chisholm) appeals the District Court's directed verdict in favor of International Harvester Co. (Harvester). Jurisdiction in the trial court for this civil antitrust action for treble damages was predicated upon Section 4 of the Clayton Act, 15 U.S.C. § 15. Appellate jurisdiction lies pursuant to 28 U.S.C. § 1291. We agree with the District Court that Chisholm presented insufficient evidence to submit to a jury in support of its claims of violations under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, and affirm the judgment below.

Until the business was sold in 1968, appellant was an independent dealer, located in Cassia County, Idaho, engaged in selling and servicing trucks and farm equipment manufactured by appellee. Chisholm had operated as a franchisee of Harvester since 1940, and, in 1944, had opened a second dealership in Minidoka County, Idaho.[1] This second dealership was subsequently sold to one Cameron who, in turn, eventually entered into an arrangement with Harvester that converted his business into a "co-dealership." Under this arrangement, 75 percent of the stock of Cameron Sales, Inc., (Cameron Sales) was owned by Harvester, while Cameron received 25 percent of the stock. The stock controlled by Harvester constituted all of the voting stock of Cameron Sales. Cameron served as president of the corporation and, with several employees of Harvester, was a member of its board of directors. The board established policy. As the executive officer, Cameron hired and fired and set the sale prices for specific items.

Chisholm alleges that, beginning in 1961, representatives of Harvester instituted a series of practices designed to coerce Chisholm to lower its retail prices and, thereby, increase profits for Harvester at the wholesale level through a larger volume of sales. Appellant maintains that upon its refusal to comply, Harvester conspired with its subsidiary, Cameron Sales, and used its control of the latter to fix its prices at a level below that charged by Chisholm, with a resultant loss of business by appellant. Appellant contends, further, that a third partici-

[1]The two franchises were approximately 8 miles apart.

pant in this conspiracy was Smith Brothers Implement Co. (Smith Brothers), another independent dealer selling and servicing Harvester's farm equipment in Cassia County, Idaho. Chisholm alleges that Harvester allowed Smith Brothers to operate at an overhead lower than that incurred by appellant, and that Smith Brothers was permitted to maintain, in violation of its franchise agreement, inadequate service facilities. Harvester is also said to have "oversold" Smith Brothers so as to cause that dealership to reduce sharply its retail prices in order to move its inventory.

In 1968, the Chisholm dealership, by then a losing enterprise, was sold to GEM International (GEM), a corporation owned by two individuals[2] and Harvester in accordance with appellee's co-dealership program. Shortly thereafter, appellant filed this suit against Harvester, and charged appellee with vertical price fixing (resale price maintenance), conspiracy to monopolize, and attempt to monopolize—violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[3] After the presentation of Chisholm's case-in-chief, the District Court concluded that Chisholm's evidence was insufficient to support any reas-

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[2]Both were former employees of Harvester and one, Calvin Johnson, had been zone manager responsible for the territory containing the Harvester dealerships involved in this suit.

[3]In its briefs filed in this appeal, appellant argues, albeit weakly, that appellee has also violated Section 2 of the Sherman Act by monopolization of the relevant product and geographic markets. This theory of liability was included neither within appellant's amended complaint, C.T. at 3-10, nor within pretrial memoranda filed by appellant's counsel. C.T. at 19-47, 474-89. We therefore decline to consider this theory of appellant's action as properly before this Court. *E.g.*, Roberson v. United States, 382 F.2d 714, 718 (9th Cir. 1967); Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 215 F.2d 167, 170 (9th Cir. 1954).

onable inferences of liability under the antitrust laws, and granted Harvester's motion for a directed verdict.[4]

As appellant reminds us, the Supreme Court has admonished that summary procedures, including directed verdicts, should be used "sparingly in complex antitrust litigation where motive and intent play leading roles . . . ." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *accord, Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied* 404 U.S. 1049 (1972). Nevertheless, if an antitrust plaintiff, as well as any other plaintiff, does not present enough evidence within his case-in-chief to support a reasonable finding in his favor, a district court has a duty to direct a verdict in favor of the opposing party. *Brady v. Southern Ry.*, 320 U.S. 476, 479-80 (1943); *Washington v. United States*, 214 F.2d 33, 41 (9th Cir.), *cert. denied* 348 U.S. 862 (1954). When considering the propriety of the grant or denial of a motion for directed verdict, the correct standard[5] is whether or not, viewing the evidence as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the

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[4]In issuing his ruling from the bench, the trial judge stated:

"I am . . . aware of the tremendous difficulty of proving a case on the plaintiff's side and of their right to have reasonable inferences and the case must hang on those ultimate inferences. But the trouble I am having in examining the evidence here is that I find the problem is that most of these inferences are based on an inference to the point mostly it is innuendo or speculation, and I just don't believe that the plaintiff has been able to produce a case here based on the violation of antitrust laws that I can properly submit to the jury, and I don't believe reasonable minds could believe that a factual situation has been presented to permit this matter to go to the jury." R.T. at 1522-23.

[5]The test is identical to that which is applied when examining the appropriateness of a judgment n.o.v. Cockrum v. Whitney, 479 F.2d 84, 85 (9th Cir. 1973); Standard Accident Ins. Co. v. Winget, 197 F.2d 97, 100 (9th Cir. 1952).

nonmoving party. *Butte Copper & Zinc Co. v. Amerman,* 157 F.2d 457, 458 (9th Cir. 1946). "Substantial evidence is more than a mere scintilla." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Butte Copper & Zinc Co., supra.* The evidence must be examined in a light most favorable to the nonmovant, *Continental Ore v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 696 & n.6 (1962), and there can be no weighing of evidence. *Tennant v. Peoria & Pekin Union Ry.,* 321 U.S. 29, 35 (1944). Finally, appellant here is entitled to the benefit of all *reasonable* inferences that may be drawn from its evidence. *Standard Oil Co. v. Moore,* 251 F.2d 188, 198 (9th Cir. 1957), *cert. denied* 356 U.S. 975 (1958).

With these considerations in mind, we now review the sufficiency of appellant's case.

Violations of Section 1 of the Sherman Act

Relying heavily upon *Albrecht v. Herald Co.,* 390 U.S. 145 (1968), appellant contends that Harvester engaged in resale price maintenance by combining with Cameron Sales and Smith Brothers in an attempt to force Chisholm to lower its retail prices. The argument fails for two reasons. Unlike in *Albrecht,* the evidence does not establish a desire or effort by Harvester to fix the prices to be charged by Chisholm. Nor does the interplay between appellee and its dealers Smith Brothers and Cameron Sales amount to concerted action designed to force compliance by Chisholm.[6]

[6]Since Section 1 of the Sherman Act requires proof of an agreement or combination before liability may attach, appellant's prima facie case under this section must contain sufficient evidence of both attempted coercion *and* concerted action intended to force Chisholm's compliance. Of course, had appellant acquiesced in Harvester's pricing demands—which is not asserted here—the

To support its contention that Harvester had coerced Chisholm to lower its prices, appellant introduced three reports written by a Harvester representative, zone manager Calvin Johnson, which reflected Johnson's opinion that Chisholm's business difficulties were caused, in part, by appellant's failure to price competitively in a buyer's market. The reports were written in 1962, 1966, and 1967, and were solely internal documents directed toward Johnson's superiors; they were from Johnson to Harvester and not to Chisholm. Johnson recommended termination of the Chisholm franchise, as appellant was "not willing to sacrifice profits to move goods" and was not interested in selling except "at or near list price." Appellant also exhibited documentary evidence indicating an interest, by Johnson's superiors, to discuss "seriously" his termination suggestions. Moreover, appellant demonstrated that the Chisholm brothers, after indicating a receptivity to suggestions by Harvester, had been told by Harvester representatives that their problems were caused by a failure to move their inventory and their insistence upon refusing to sell whenever a profit would not be realized. Yet the Chisholm brothers also were advised of several other alternatives that might possibly have improved their financial condition. Thus, Harvester recommended a reduction in excessive expenses, a reduction in

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requisite plurality of conduct would be present. Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 46-47 (1960). Thus, even if one assumes that there is substantial evidence of an attempt by Harvester to induce Chisholm to lower its retail prices, there can be no liability under Section 1 of the Sherman Act unless there is also sufficient evidence that Harvester engaged either Cameron Sales or Smith Brothers to assist it to achieve this result. *Parke, Davis & Co., supra* at 44; United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

excessive used merchandise received in "barter" or trade-in transactions, and even the assumption of a more optimistic and aggressive attitude. The Chisholm brothers themselves testified that they were not told at what prices they were to sell Harvester's products; at best, Harvester representatives only advised them of a need to "meet competition."[7]

This evidence pales in comparison with the proof deemed sufficient to establish coercion in the classic resale price maintenance cases. Thus, for example, in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the dealer, upon raising his prices above that suggested by the Herald Co., was informed by the latter that the newspaper company was entering into direct competition with Albrecht, its dealer. Moreover, Albrecht was threatened with termination if he continued to overcharge, and was told that he could have his customers back only if he charged the suggested price. 390 U.S. at 147-48. Similarly, in this

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[7] R.T. at 769, 798-99, 971.
Donald Chisholm testified as follows:
"Q. Yesterday you mentioned that International Harvester gives you a suggested list price; do you recall that?
"A. Yes, sir.
"Q. And you also testified that you had to have some kind of suggested price; do you remember that?
"A. Yes, sir.
"Q. And that you found this suggestion of Harvester's useful?
"A. The industry does, yes.
"Q. And Harvester never told you you had to charge that price, did they?
"A. No.
"Q. You were left to charge whatever price you felt like charging; isn't that correct?
"A. That is correct.
"Q. But you decided of your own free will that you would try to charge the suggested price; isn't that correct?
"A. That is right." R.T. at 768-69.

court's decision in *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963), there was testimony that the recalcitrant dealer had been expressly threatened with cancellation by a representative of the manufacturer after he had begun to deviate from Gate's suggested resale prices. 325 F.2d at 198. The dealer was cancelled, and, further, there was evidence that the manufacturer pursued a systematic policy of refusing to deal with distributors who did not comply with its suggested price schedule. *Id.* at 202. Here, appellant's evidence does not directly prove or give rise to reasonable inferences that Harvester even suggested specific prices to be charged by Chisholm,[8] let alone threatened to cancel Chisholm's franchise for failure to comply.

Appellant presented no direct evidence to support its allegation that the Cameron Sales co-dealership was established and operated to force Chisholm to increase its sales volume or, alternatively, terminate its franchise. While we recognize the import of circumstantial evidence in antitrust litigation, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221-27 (1939), once again reference and comparison to the much-cited resale price maintenance cases demonstrates the weakness of appellant's assertions. For example, in *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922), the manufacturer enforced its price maintenance

[8]Harvester did provide suggested retail prices for its products, but Chisholm alleges that it was pressured to sell at prices *below* those suggested. Chisholm was, in fact, selling "at or near" the listed prices.

scheme by refusing to deal not only with jobbers, retailers, and wholesalers who failed to abide by Beech-Nut's suggested prices, but also with other distributors who sold to such noncomplying jobbers, retailers, and wholesalers. Resumption of business was possible only upon assurances that the distributor would maintain Beech-Nut's suggested prices and refuse to deal with any distributors who did not. Moreover, "price-cutters" were reported to Beech-Nut by other distributors of its products, and other jobbers, retailers, and wholesalers were notified by Beech-Nut precisely which individuals were deviating from the company's price schedules so that these individuals might be boycotted pursuant to the "Beech-Nut Policy." 257 U.S. at 446-51.[9]

We have nothing of that sort in the case before us. Appellant makes much of the undisputed evidence that Harvester expressed interest in Cameron Sales's large inventory of overaged new and used goods and items received in "barter" transactions. Cameron was told by Harvester representatives that he should move this in-

[9]The *Beech-Nut* scenario is fairly typical of the many cases in which liability for vertical price fixing has been found. *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 33 (1960) (compliance obtained by refusing to deal with maverick retailers *and* with wholesalers who dealt with such retailers). In Albrecht v. Herald Co., 390 U.S. 145 (1968), the carrier who raised his price beyond the level suggested by the newspaper was confronted by a combination of the newspaper and two additional parties who—with knowledge that the activities were designed to force compliance by Albrecht—joined with the newspaper in directly competing for Albrecht's customers. 390 U.S. at 147-50. In our decision in Girardi v. Gates Rubber Co. Sales Division, Inc., 325 F.2d 196 (9th Cir. 1963), the concerted action intended to force compliance was jobbers' complaints to the manufacturer in which they reported variation by another from the manufacturer's suggested retail prices. 325 F.2d at 200-04.

ventory; indeed, he was told that the barter items should be disposed of "regardless of price." Yet the evidence does not support a reasonable inference that parent-Harvester's interplay with its subsidiary Cameron Sales was designed to implement, as in *Beech-Nut* and its progency, a pervasive scheme of resale price maintenance. It was simply giving business management and direction to a corporation in which it had a 75 percent stock ownership. There is no substantial evidence allowing a conclusion that Cameron Sales was operated to trigger lower prices by Chisholm.

We are also unable to agree with appellant that the concerted action between Harvester and Cameron Sales[10] constituted an agreement to fix the resale prices to be charged by the latter. The crux of any price-fixing agreement is the relinquishment by a trader (here, Cameron) of the freedom to set prices in accordance with his own judgment. *See Gray v. Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960), *quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 882-83 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969). There was abundant testimony below that Cameron, as president of Cameron Sales, retained the authority to price the items to be sold

[10]It is clear that the interaction between Harvester and Cameron Sales satisfied the "agreement" requirement of section 1. *See, e.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951). The issue thus becomes whether or not this agreement resulted in an unreasonable restraint of trade.

by the corporation.[11] Harvester's suggestion—even "pressure"—that Cameron set prices for his inventory of new and used overaged goods that would facilitate the depletion of this inventory never amounted to a specification of what prices were to be charged by Cameron. To be sure, appellant elicited testimony demonstrating that Cameron was advised, or "pressured," to move this inventory "regardless of price." Nonetheless, the bulk of the testimony, and in particular that of Cameron himself, does not permit one reasonably to infer that these expressions by Harvester representatives impinged Cameron's independent pricing discretion.[12]

Our analysis may not be terminated, however, by concluding that the interplay between Harvester and Cameron Sales did not constitute vertical price fixing, which is per se unreasonable under Section 1 of the Sherman Act. We must also examine the evidence and inquire whether appellant presented a sufficient case for liability when the acts in question are scrutinized pursuant to a rule-of-reason test.[13] Under this approach, it is necessary

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[11]R.T. at 448-50, 502-03, 1042, 1080, 1097-98, 1114, 1439-42. As appellant argues, the board of directors of Cameron Sales, consisting of Cameron and several Harvester employees, possessed the authority to remove the corporation's president should the business be conducted unprofitably. This is not the equivalent, however, of an ability to dictate to the president the specific prices to be charged by the dealership.

[12]When questioned about the statement of Harvester's representative that his overaged goods and barter should be moved "regardless of price," Cameron responded:

> "That's what he says, but after all, he didn't have any money invested in this business and I did. I suspect that I am going to be a little bit careful how I am going to treat those prices." R.T. at 448.

[13]The term "rule of reason" was introduced by Chief Justice White in Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911). Since that time, the rule has been employed to determine whether

to consider the purpose of the practices, the power of Harvester in the relevant product and geographic markets, and the effect of the practices upon competition within these markets. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 615 (1953); *see Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918) (Brandeis, J.). With the evidence presented below, we need look at only the first of these requirements: Harvester, as a parent corporation, was entitled to ensure that Cameron Sales's inventory was sufficiently fluid so as to avoid excessive interest charges incurred by reason of retention of overaged products.[14] Moreover, Harvester's concern for the movement of overaged goods and Cameron's barter inventory, both of which involved significant capital and were subject to loss attributable to depreciation, is supported by sound business judgment.[15] We perceive no substantial evidence upon which to predi-

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agreements among entrepreneurs violate Section 1 of the Sherman Act as combinations "in restraint of trade." *E.g.,* United States v. Topco Associates, Inc., 405 U.S. 596, 606-07 (1972). *See* A.D. Neale, The Antitrust Laws of the U.S.A. 20-27 (2d ed. 1970); 1 J. von Kalinowski, Antitrust Laws and Trade Regulation §6.02[1] (1971). The rule is not applied to those agreements, such as agreements to fix prices, that, because of their inherent "pernicious" effect upon competition, are regarded as unreasonable per se. *Topco, supra* at 607; Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958).

[14]Harvester allows its dealers to hold new equipment for sale without payment or interest for 9 or 12 months depending upon the type of equipment involved. At the expiration of this period, interest at the market rate on the equipment still on hand must be paid. R.T. at 1168-69.

[15]In addition to the prevention of interest and depreciation expenses and the desire to release needed capital, the movement of inventory was designed to permit Cameron Sales to qualify for Harvester's volume discount.

cate an inference that Harvester acted in furtherance of anticompetitive objectives. *See generally United States v. Columbia Steel Co.*, 334 U.S. 495, 522-23 (1948); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76-80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 663, 665 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963).

In support of its contention to the contrary, and also in support of its allegation that Harveser violated Section 2 of the Sherman Act by attempting and conspiring to monopolize, appellant points to a meeting of several Harvester dealers, held after Chisholm had terminated its franchise, at which a fixed price for a certain item was agreed upon. Appellant cites several cases for the proposition that such a subsequent event is relevant circumstantial evidence to establish the presence of anticompetitive conduct occurring within the prior period, *i.e.*, the period before appellant sold its franchise. *E.g.*, *FTC v. Cement Institute*, 333 U.S. 683, 703-06 (1948). We do not dispute this rule of evidence. *See Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196, 203 (9th Cir. 1963). When this evidence is viewed in conjunction with the totality of the testimony presented below, however, the probative value of this single meeting is significantly diminished. Any inference that Harvester intended to fix prices during the prior period is rebutted by evidence establishing legitimate business purposes for its actions during that period. In other words, evidence of this single price-fixing meeting, although favorable to appellant, did not contribute to substantial evidence suffi-

cient to withstand a directed verdict in favor of appellee.[16] *Compare Girardi, supra.*

There is no evidence to support appellant's assertion that Smith Brothers conspired with Harvester to coerce Chisholm to lower its prices or, alternatively, retire from the market. Thurlow Smith, the active partner, testified that Harvester never forced him to accept merchandise he did not desire; if his dealership was overstocked, such was regarded by him only as a regular incident of this particular business enterprise.[17] The evidence indicates that Harvester, rather than tolerating inadequate service facilities at Smith Brothers, sought to improve the dealership's "parts" department. More importantly, however, the differential in overhead between Chisholm and Smith Brothers is assignable to the former's stress upon service over sales for the derivation of profit and, further, to a difference in scope between the two businesses.[18]

Violations of Section 2 of the Sherman Act

Appellant's prima facie case to establish liability for attempt and conspiracy to monopolize required proof that Harvester possessed a specific intent to acquire unlawful monopoly power. *Times-Picayune Publishing Co. v. United*

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[16]Similarly, the statement by Cameron, after Chisholm had terminated its relation with Harvester, that he hoped Chisholm's replacement would engage in interbrand, rather than intrabrand, competition, although relevant, lacks sufficient probative value to allow an imputation of anticompetitive intent to Harvester during the prior period.

[17]R.T. at 564-72.

[18]For example, Smith Brothers, unlike Chisholm, carried only International's farm equipment, not its trucks. It operates out of a service station. John Chisholm testified that his dealership relied upon its parts and service department, and Harvester's volume discount, to recoup losses incurred on sales of Harvester's trucks. *See* R.T. at 873, 924.

States, 345 U.S. 594, 626 (1953); *United States v. Griffith,* 334 U.S. 100, 105 (1948); *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 474-75 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964). We have only recently reaffirmed previous decisions of this court holding that this specific intent "must be accompanied by predatory conduct directed to accomplishing the unlawful purpose." *Hallmark Industry v. Reynolds Metal Co.,* 489 F.2d 8, 12 (9th Cir. 1973). Generally, it is from this predatory conduct that the requisite specific intent can be inferred. *Id.* We have examined carefully the evidence depicting Harvester's operations in Cassia and Minidoka Counties during the critical time period at issue. We agree with the District Court that the evidence did not disclose that Harvester's actions were not predominantly motivated by legitimate business objectives. Accordingly, appellant's case under Section 2 of the Sherman Act must fail. *See Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 626-27 (1953); *Independent Iron Works, Inc. v. United States Steel Corp.,* 322 F.2d 656, 667-68 (9th Cir.), *cert. denied,* 375 U.S. 922 (1963).

Harvester did not manage its subsidiary Cameron Sales without regard to retail profit. Indeed, the continued solvency of Cameron Sales underlay Harvester's attempts to have the corporation reduce its inventory of overaged goods and items received through barter transactions. Prolonged maintenance of such an inventory would, according to the testimony adduced below, result in a substantial restriction of invested capital and would necessitate interest payments and other avoidable expenses.[19] The record shows that Cameron Sales operated profitably

[19] *See* notes 14-15 *supra.*

for the majority of the years in question.[20] With these facts, appellant's reliance upon *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W.D.Pa. 1968), *aff'd on other grounds*, 417 F.2d 622 (3d Cir. 1969), is misplaced.[21] *Cf. England v. Chrysler Corp.*, No. 71-2842, at 6-8 (9th Cir. Feb. 11, 1974).

In conclusion, we have reviewed appellant's case with full regard for our duty to examine the evidence as a whole. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962). The District Court correctly granted appellee's motion for a directed verdict.

The judgment is affirmed.

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[20]Net profit was demonstrated for fiscal year 1964 and fiscal years 1966-1970. R.T. at 509-11. Cameron purchased Harvester's interest in Cameron Sales in 1971 and, thereby, terminated the co-dealership arrangement.

[21]In *Mt. Lebanon Motors, supra*, plaintiff, a former independent Chrysler automobile dealer, sued Chrysler Corp. and alleged that Chrysler was using its wholly owned and substantially owned dealerships in an attempt to obtain monopoly power. The court summarized plaintiff's evidence, which was held sufficient to withstand a motion for a directed verdict, as follows:

> "Plaintiff offered evidence tending to show that the Chrysler-financed dealerships, commonly called 'factory stores', engaged in price-cutting and massive advertising, to the detriment of privately-financed dealerships in the Pittsburgh area, which were not able to afford advertising on such a large scale or to accept profits as small as those obtained by the factory stores in their deals with customers.
>
> "Plaintiff's proof tended to show that the factory stores consistently lost money and were unprofitable; but that from time to time, when circumstances required, Chrysler would make gifts or additional investments in the form of 'capital contributions' to the factory-financed dealerships, thus enabling them to continue in business, notwithstanding their losses resulting from their normal operations.
>
> "There was also evidence that the 'dealer enterprise' division of Chrysler would from time to time furnish temporary employees to the factory stores when they experienced a shortage of adequate personnel and would furnish assistance to the factory stores in establishing their accounting systems and would also furnish substantial advertising allowances in launching the new dealerships." 283 F. Supp. at 457.

Appendix B

United States Court of Appeal
for the Ninth Circuit

Chisholm Brothers Farm Equipment Co., Plaintiff-Appellant, vs. International Harvester Company, Defendant-Appellee.	No. 71-3012

[Filed July 9, 1974]

Before: ELY, TRASK and WALLACE, Circuit Judges

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.